A **DAHAN CIPTA SDN BHD & ANOR v. YONG TSHU KHIN & ORS AND OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
VERNON ONG LAM KIAT JCA
B ZALEHA YUSOF JCA
[CIVIL APPEALS NO: B-02-1004-05-2012, B-02-943-04-2012, B-02-941-04-2012 & B-02-1077-05-2012]
17 OCTOBER 2016

C ***CONTRACT:*** *Illegality – Agreement – Sale and purchase agreement – Seller of land claimed to be beneficial owner of land through arbitration award – High Court ordered enforcement of arbitration award for sale of land to purchasers – Appeal against decision of High Court – Whether land held on trust – Whether there was breach of trust by registered proprietors of land – Whether arbitrator exceeded*
D *jurisdiction in making arbitration award*

CONTRACT: *Sale and purchase of land – Agreement – Draft sale and purchase agreement – No formal sale and purchase agreement executed – Whether there was valid, concluded and binding contract*

E ***ARBITRATION:*** *Award – Validity – Whether there was any application to set aside arbitration award – Whether arbitration award which was not set aside akin to final judgment of court – Whether non-registration of arbitration award rendered arbitration award invalid*

This case involved four appeals against the decision of the High Court Judge
F who made several orders involving consolidated actions of three suits, namely suits MT5-22-81-1992, MT3-22-356-08 and OS R8-24-70-1990. In the High Court suit MT5-22-81-92, the plaintiffs claimed to be joint purchasers of a piece land ('the said land') by virtue of a transaction with the first defendant. The plaintiffs agreed to buy the said land as the first defendant
G had claimed to be the beneficial owner of the said land through the Arbitration Award ('AA') obtained against the registered proprietors of the said land after a joint venture agreement ('JVA') entered between the first defendant failed. It was alleged that the purchase price of the said land was fixed and a deposit was paid. Further, a draft sale and purchase agreement ('SPA') was also prepared but the first defendant did not sign the SPA. The
H High Court Judge ordered, *inter alia*, (i) specific performance of the agreement made between the plaintiffs and the first defendant; and (ii) that the first defendant perform the enforcement of the AA for the sale of the land to the plaintiffs. The sixth defendant's alleged claim was that the land was held, *inter alia*, on trust for him. In the circumstances, amongst others, the
I sixth defendant appealed against the decision of the High Court Judge against all the three suits. The sixth defendant raised the issue of illegality grounded

on the purported breach of trust by both the registered proprietors of the land. The sixth defendant also argued, *inter alia*, that that the arbitrator had exceeded his jurisdiction in making the AA. Further issue that arose for determination was whether there was a concluded, valid and binding contract for the sale and purchase of the said land although there was no formal SPA executed.

Held (dismissing appeals with costs)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) The JVA, AA and the consent judgment were attacked by the sixth defendant on the basis that there was a breach of trust. But the fact that the land was a trust property or that the two registered proprietors were holding them in trust were not mentioned in any of the documents. A court will only be permitted to consider an unpleaded issue of illegality if there is *ex facie* illegality. Therefore, the High Court Judge had properly directed herself that there was no cogent evidence to merit the sixth defendant's claim for a trust. (paras 16 &18)

(2) It was not the sixth defendant's pleaded case that the plaintiffs had knowledge of the alleged trust by entering into the contract to purchase or that the plaintiffs were not *bona fide* purchasers for value. Even the JV and AA did not provide that the said land was the subject matter of a trust. Also, the sixth defendant had never taken the issue of jurisdiction in the High Court nor was it raised in the memorandum of appeal before this court. Thus it was plainly obvious that the plea of jurisdiction was an afterthought. (paras 23, 29 & 32)

(3) At all material times there was no application to set aside the AA. There was also no appeal by any of the parties to the AA against the order for the enforcement of the AA. By virtue of s. 17 of the Arbitration Act 1952, the AA was therefore final and binding. (para 36)

(4) There existed a valid and binding contract between the plaintiffs and the first defendant for the sale and purchase of the land; when the first defendant made the offer, the plaintiffs accepted and paid the deposit; notwithstanding the fact that the land was not registered in the first defendant's name. Further, the fact that the land must first be registered in the first defendant's name pursuant to the AA was within the power of the first defendant to secure. Hence to use that as an excuse would be to permit the first defendant to take advantage of his own wrong doing. (paras 47 & 49)

(5) As long as the AA is not set aside, the AA is akin to a final judgment of court. Non-registration of the AA under the Arbitration Act 1952 does not render it invalid. Registration is only required if it is sought to employ the machinery of the court to enforce the same. (para 50)

(6) There was a valid, concluded and binding contract despite the non-existence of a duly executed formal agreement. The first defendant had made its offer and the plaintiffs had accepted it. There was consideration. The deposit paid was kept by the first defendant and was never returned to the plaintiffs which showed the unequivocal act of part performance by the plaintiffs. There were also certainties of parties, price and property. Hence, the findings made by the trial judge should not be disturbed and appellate intervention was not warranted. (para 53)

Bahasa Malaysia *Headnotes*

Kes ini melibatkan empat rayuan terhadap keputusan Hakim Mahkamah Tinggi dalam memberi beberapa perintah yang melibatkan tiga tindakan guaman yang tergabung, iaitu, MT5-22-81-1992, MT3-22-356-08 dan OS R8-24-70-1990. Dalam tindakan Mahkamah Tinggi MT5-22-81-92, plaintif-plaintif mendakwa bahawa mereka adalah pembeli bersama sebidang tanah ('tanah tersebut') melalui satu transaksi dengan defendan pertama. Plaintif bersetuju membeli tanah tersebut kerana defendan pertama mengaku sebagai pemilik benefisial tanah tersebut melalui award Timbang Tara ('AA') yang diperolehi terhadap pemilik berdaftar tanah tersebut selepas satu perjanjian usaha sama ('JV') yang dimeterai antara defendan pertama gagal. Didakwa bahawa harga pembelian tanah tersebut ditetapkan dan deposit dibayar. Selanjutnya, draf perjanjian jual beli ('SPA') juga telah disediakan tetapi defendan pertama tidak menandatangani SPA tersebut. Hakim Mahkamah Tinggi memerintahkan, antara lain, (i) pelaksanaan spesifik perjanjian yang dimeterai antara plaintif-plaintif dan defendan pertama; dan (ii) bahawa defendan pertama melaksanakan penguatkuasaan AA bagi penjualan tanah kepada plaintif-plaintif. Dakwaan defendan keenam adalah bahawa tanah tersebut dipegang sebagai amanah, antara lain, untuknya. Oleh itu, antara lain, defendan keenam merayu terhadap keputusan Hakim Mahkamah Tinggi dalam ketiga-tiga tindakan guaman. Defendan keenam membangkitkan isu ketidaksahan berasaskan kemungkiran amanah oleh kedua-dua tuan punya berdaftar tanah tersebut. Defendan keenam juga menghujahkan, antara lain, bahawa penimbang tara telah melampaui bidang kuasanya dalam memberikan AA. Isu selanjutnya yang dibangkitkan untuk pertimbangan mahkamah adalah sama ada terdapat perjanjian muktamad, sah dan mengikat untuk jual beli tanah tersebut walaupun tiada perjanjian jual beli formal yang dimeterai.

Diputuskan (menolak rayuan dengan kos)
Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Perjanjian JV, AA dan penghakiman persetujuan dipertikaikan oleh defendan keenam atas dasar pecah amanah. Tetapi fakta bahawa tanah tersebut adalah harta amanah atau bahawa kedua-dua pemilik berdaftar adalah pemegang amanah tanah tersebut tidak disebut dalam mana-mana dokumen. Mahkamah hanya boleh mempertimbangkan isu yang tidak diplidkan jika terdapat ketidaksahan *ex facie*. Oleh itu, Hakim

Mahkamah Tinggi telah mempertimbangkan dengan betul bahawa tidak ada bukti yang meyakinkan untuk mewajarkan tuntutan amanah defendan keenam.

(2) Bukanlah kes defendan keenam bahawa plaintif-plaintif mempunyai pengetahuan mengenai amanah dengan memeterai perjanjian untuk membeli atau bahawa plaintif-plaintif bukan pembeli *bona fide* untuk nilai. Perjanjian JV dan AA juga tidak memperuntukkan bahawa tanah tersebut adalah hal perkara sesuatu amanah. Juga, defendan keenam tidak membangkitkan isu bidang kuasa di Mahkamah Tinggi dan dalam memorandum rayuan di hadapan mahkamah ini. Oleh itu, adalah jelas bahawa pli bidang kuasa adalah suatu fikiran terkemudian.

(3) Pada semua masa material, tidak terdapat permohonan untuk mengetepikan AA tersebut. Juga tidak terdapat rayuan oleh mana-mana pihak kepada AA terhadap perintah penguatkuasaan AA. Berdasarkan peruntukan s. 17 Akta Timbang Tara 1952, AA tersebut muktamad dan mengikat pihak-pihak.

(4) Terdapat kontrak sah dan mengikat antara plaintif-plaintif dan defendan pertama untuk jual beli tanah tersebut; apabila defendan pertama membuat tawaran, plaintif-plaintif menerima dan membayar deposit; walaupun fakta bahawa tanah tersebut tidak didaftarkan atas nama defendan keenam. Juga, fakta bahawa tanah tersebut terlebih dahulu pertama sekali didaftarkan atas nama defendan keenam berdasarkan AA adalah dalam kuasa defendan keenam untuk berbuat demikian.

(5) Selagi AA tidak diketepikan, AA tersebut adalah sama seperti penghakiman mahkamah. Kegagalan mendaftarkan AA dalam Akta Timbang Tara 1952 tidak menjadikannya tidak sah. Pendaftaran hanya diperlukan jika permohonan dibuat ke mahkamah untuk menguatkuasakannya.

(6) Terdapat kontrak yang sah, muktamad dan mengikat walaupun tiada perjanjian formal. Defendan membuat tawaran dan plaintif-plaintif menerima tawaran tersebut. Terdapat balasan. Deposit yang dibayar disimpan oleh defendan pertama dan tidak dipulangkan kepada plaintif-plaintif menunjukkan pelakuan tidak bercanggah plaintif-plaintif. Terdapat juga kepastian pihak-pihak, harga dan harta. Oleh itu, dapatan hakim bicara tidak patut diganggu dan campur tangan rayuan adalah tidak wajar.

Case(s) referred to:

Abdul Kudus Hj Abd Aziz v. Normah Cik [2003] 1 LNS 189 HC ***(refd)***

Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Conlay Construction Sdn Bhd v. Perembau (M) Sdn Bhd [2013] 9 CLJ 828 FC ***(refd)***

Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd [2015] 9 CLJ 677 FC ***(refd)***

Fusing Construction Sdn Bhd v. Eon Finance Bhd & Ors And Another Appeal [2000] 3 CLJ 341 CA ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

Halimah Abdul Rahman v. Fatimah Abdullah [1976] 1 LNS 38 FC ***(refd)***

IJM Corporation Bhd v. Zamri Hj Ibrahim & Anor [2014] 7 CLJ 479 CA ***(refd)***

Kho Ah Soon v. Ooi Kar Seng (Properties) Sdn Bhd [1995] 3 CLJ 812 CA ***(refd)***

Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 1 CLJ 233; [1983] CLJ (Rep) 231 FC ***(refd)***

Malaysia Discounts Bhd & Ors v. Pesaka Astana (M) Sdn Bhd & Ors [2008] 6 MLJ 839 ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Nelson v. Nelson [1995] 184 CLR 538 ***(refd)***

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases [2006] 8 CLJ 364 HC ***(refd)***

Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors [1997] 2 CLJ 58 SC ***(refd)***

Tan Kau Tiah v. Tetuan Teh Kim Teh, Salina & Co & Anor [2010] 4 CLJ 914 CA ***(refd)***

Tetuan Teh Kim Teh, Salina & Co v. Tan Kau Tiah & Anor [2013] 5 CLJ 161 FC ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 17

(Civil Appeal No: B-02-1004-05-2012)

For the appellant - Paramjit Singh, Harjit Singh Sandhu & Nikkita Raj Kaur; M/s Harjit Sandhu, Wan & Assocs

For the respondents - Su Tiang Ju & Jerry Ling, Fong Teng Fook & Faye Lim; M/s Lee Ling & Partners

(Civil Appeal No: B-02-1077-05-2012)

For the appellant - Shopna Rani Malakar; M/s Satkuna & Co

For the respondents - Su Tiang Ju & Jerry Ling, Fong Teng Fook & Faye Lim; M/s Lee Ling & Partners

(Civil Appeal No: B-02-943-04-2012)

For the appellant - Jack Soosai & Vinod Ramasamy; M/s Emma & Azimah

For the respondents - Su Tiang Ju & Jerry Ling, Fong Teng Fook & Faye Lim; M/s Lee Ling & Partners

(Civil Appeal No: B-02-941-04-2012)

For the Appellant - MS Murthi & Palanimmah Mutu; M/s Kumar Chambers

For the respondents - Su Tiang Ju & Jerry Ling, Fong Teng Fook & Faye Lim; M/s Lee Ling & Partners

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: MT5-22-81-1992 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Zaleha Yusof JCA:

[1] The four appeals before us were against the decision of the learned High Court Judge at Shah Alam who on 23 March 2012 made the following orders involving consolidated actions of three suits. The decision, *inter alia*, was:

(i) Suit No. MT5-22-81-92

(a) that the prayer for specific performance of the agreement made between the plaintiffs and the first defendant whereby the first defendant agreed to sell to the plaintiffs a piece of land known as CT No. 22358 Lot 623, Mukim Kajang, Daerah Ulu Langat, Negeri Selangor (the said land) was allowed;

(b) that the first defendant, its servant and/or agent to perform the enforcement of the arbitration award dated 29 October 1988 and the sale of the said land to the plaintiffs;

(c) the fourth and fifth defendants were ordered to sign the transfer form to transfer the said land to the plaintiffs within seven days from the date of the order; and

(d) the defendants' counterclaims were all dismissed with costs.

(ii) MT3-22-356-08

The action was dismissed with costs.

(iii) OS No. R8-24-70-1990

This action was allowed with costs.

[2] In Suit No. MT5-22-81-92, Yong Tshu Khin (Yong) and Annie Quah Lay Nah (Annie Quah), the first and second respondents in all these four appeals, were the plaintiffs. They were suing MMCE Properties Sdn Bhd (MMCE), the first defendant mentioned in the judgment, for specific performance of the agreement made between them whereby MMCE agreed to sell the said land to them. Yong and Annie Quah also sought to enforce the arbitration award dated 29 January 1981 (AA) and to sell the said land to them.

[3] MMCE claims that it has beneficial interest to the said land by virtue of the AA made in their favour against the registered proprietor of the said land.

[4] The other parties to this Suit No. MT5-22-81-92 as clearly explained by the learned trial judge are as follows:

(a) The second defendant, (Mohandas a/l M.S. Nair), was at all material times a solicitor acting on behalf of the first defendant in the matter of

A the said land. The second defendant could not be traced and was unrepresented at the trial. No judgment was made against him.

(b) The third defendant, (Dahan Cipta Sdn Bhd), is a private company registered under the Companies Act. The third defendant's alleged claim to the said land was premised on two sales and purchase agreements in
B respect of the said land dated 17 August 1993 and 26 September 1995 with the registered proprietors of the said land.

(c) The fourth defendant, (Anbazagan a/l Ramasamy), is the son and administrator of the estate of Ramasamy @ Raman a/l Kamachee (deceased), one of the registered proprietors of the said land. On
C 10 April 1997, the said Ramasamy passed away. By an order of the court dated 17 April 1998, the fourth defendant was appointed as the representative of the estate of Ramasamy. On 13 October 1999, the fourth defendant was appointed as the administrator of the Ramasamy's estate.

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(d) The fifth defendant (N Letchumanan), is the other registered proprietor of the said land.

(e) The sixth defendant, (Murugan a/l Kali), is a representative of 120 contributories who allegedly had contributed funds to a housing scheme
E proposed by the Malaysian Dravidian Association (MDA) in respect of the said land.

[5] In MT3-22-356-08, the plaintiff is N Letchumanan. The defendants are Yong, Annie Quah and two others. The relief he sought was to set aside a consent judgment dated 2 March 1999 entered between him and Yong and
F Annie Quah on his undivided one-half share of the said land.

[6] In OS No. R8-24-70-1990, MMCE sought to enforce the AA they secured against the two registered proprietors of the said land, as a judgment.

[7] It is thus, very obvious that the said land is the very subject matter of
G these suits and appeals where the registered proprietors of the said land are K Ramasamy half share and N Letchumanan half share. After perusing the records of appeal and after having heard and considered the submissions of the respective counsel for the parties, we decided to dismiss the appeals. We now set out our grounds for having so decided. For ease of reference, in
H subsequent paragraphs, we shall refer the parties as they were referred to in Suit No. MT5-22-81-92.

Background Facts

[8] The essential facts surrounding these appeals had been adequately captured by the learned trial judge in her grounds of judgment. For the
I purpose of these appeals, we would highlight the pertinent relevant facts as follows:

(i) As mentioned earlier, the registered proprietors of the said land are the father of the fourth defendant (Ramasamy) and the fifth defendant. The said land was bought and registered in their names in August 1980.

(ii) the claimants to the said land are the plaintiffs, the third defendant and the sixth defendant.

(iii) the plaintiffs' claim to be joint purchasers of the said land is by virtue of a transaction with the first defendant. A meeting was held on 24 September 1991, where the purchase price was fixed and a deposit was paid. A draft sales and purchase agreement (SPA) was subsequently prepared but the first defendant did not sign the SPA. The plaintiffs agreed to buy as the first defendant had claimed to be the beneficial owner of the said land through the AA dated 29 January 1988, obtained against the registered proprietors after the joint venture agreement (VA) dated 23 September 1985 entered between the first defendant and the registered proprietors to jointly develop the said land, failed.

(iv) the third defendant's claim is premised on two sales and purchase agreements in respect of the said land, entered between the third defendant and the registered proprietors dated 17 August 1993 and 26 September 1995. The second sale and purchase agreement dated 26 September 1995 was entered because the fifth defendant was bankrupt when the first agreement was entered into.

(v) The sixth defendant's alleged claim is that the said land is held in trust for him and 120 contributories who according to him are the beneficial owners of the said land. The sixth defendant claims to be a representative of the 120 persons who had contributed funds to a housing scheme proposed by the MDA. The scheme involved the proposed acquisition and building of single storey houses at cost ranging from RM18,000 to RM30,000 on the said land, for the benefit of the sixth defendant and the 120 contributories.

The Appeal

[9] The first defendant is appealing against the decision in MT5-22-81-1992.

[10] The third, fourth and fifth defendants are appealing against the decision in MT5-22-81-1992 and MT3-22-356-08.

[11] The sixth defendant is appealing against all three ie, MT5-22-81-1992, MT3-22-356-08 and OS R8-24-70-1990.

Issues And Decision

[12] We are of the view that the issue here is whether there was a concluded valid and binding contract between the plaintiffs and the first defendant for the sale and purchase of the said land although there was no formal SPA executed between them.

[13] However, learned counsel for the sixth defendant had raised the following issues:

(i) the purported illegality of the JV agreement, AA and the consent judgment between the plaintiffs and the fifth defendant.

(ii) that the arbitrator had exceeded his jurisdiction in making the AA.

[14] We decided to deal first with the issue of illegality and jurisdiction raised by the sixth defendant. The issue of illegality raised by the sixth defendant was grounded in the purported breach of trust by both the registered proprietors of the land. The sixth defendant contended that the JV agreement was illegal and in contravention of the Trustee Act 1949 as the registered proprietors held the land in trust of the sixth defendant and the 120 contributories. He also argued that the consent order in which the fifth defendant had transferred his undivided half share in the said land to the plaintiffs was invalid as the fifth defendant was aware that the said land was held in trust for the sixth defendant and the 120 contributories and that the consent order was procured by way of financial inducement from the plaintiffs.

[15] First, we observe that this issue of illegality was not the sixth defendant's pleaded case. It was not pleaded in his statement of defence and counterclaim and neither was it raised as a ground of appeal in his memorandum of appeal. Learned counsel for the sixth defendant however, referred this court to the case of *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah* [2015] 8 CLJ 212 wherein at p. 229, para. 35, the Federal Court stated that courts are bound at all stages to take notice of illegality even though not pleaded. However, in the more recent Federal Court decision of *Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd* [2015] 9 CLJ 677; [2015] 6 MLJ 725 at para. 15, it was stated that:

> ... A court may act on *ex facie* illegality in the absence of a plea (See *Merong Mahawangsa & anor v Dato' Shazryl Eskay bin Abdullah* [2015] 8 CLJ 212). But other than *ex facie* illegality, any radical departure from the pleaded case must be pleaded, to avoid surprise at the trial. Illegality on the face of it was not made out. Therefore, 'loan' which was not pleaded and which was a radical departure from the pleaded defence, should not have been allowed to be proved at the trial (see *Singapore Civil Procedure 2015* Volume 1 at 18/8/2).

[16] We therefore, agree with learned counsel for the plaintiffs that the test as laid down by the Federal Court case of *Dato' Hamzah Abdul Majid (supra)* is that a court will only be permitted to consider an unpleaded issue of illegality if there is *ex facie* illegality. What it means here is that whether the documents on the face of it are illegal. These documents ie the JV agreement, AA and the consent judgment were attacked by the sixth defendant on the basis that there was a breach of trust. But the fact that the land was a trust property or that the two registered proprietors were holding them in trust were not mentioned in any of the documents.

[17] Further, there was the following finding of the learned trial judge at p. 29 of her ground of judgment: A

> After careful consideration, I am satisfied that the 6th defendant has not adduced cogent evidence to merit their claim. The 6th defendant's pleadings do not contain details of the alleged purchase price paid for the said land and the total amount alleged to have been paid by the 6th B defendant and the 120 contributors. Although the 6th defendant testified to having paid RM3000, only a receipt for a sum of RM500 was produced. From the documentary evidence, the 6th defendant had paid a sum of RM500 in July 1981 (Ex. D81) when the said land was already registered in the names of the two registered proprietors' i.e in 1980. In addition, Exhibit P81 (1-23) only lists 17 contributors who had paid varying amounts C for a total sum of RM36.724. There was no other evidence of payment by the alleged balance of 103 contributors. Thus the 6th defendant's claim of a constructive trust in respect of the said land is clearly unsustainable.

[18] We are of the view that the learned High Court Judge had properly directed herself that there was no cogent evidence to merit the sixth D defendant's claim for a trust.

[19] We also agree with learned counsel for the first defendant that unlike the Contracts Act 1950, there is no specific provision for illegality on the Trustee Act 1949. The importance of such a provision is that it will assist the court in assessing the seriousness of the illegality. This was explained by E the Court of Appeal in *Fusing Construction Sdn Bhd v. Eon Finance Bhd & Ors And Another Appeal* [2000] 3 CLJ 341; [2000] 3 MLJ 95 wherein the Court of Appeal had cited a passage from *Nelson v. Nelson* [1995] 184 CLR 538 at p. 612 as follows:

> The seriousness of the illegality must be judged by reference to the statute F whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality; otherwise the courts would embark on an assessment of moral turpitude independently of the potentially in conflict with the assessment made by the legislature G

[20] As it is, the basis for there being illegality is premised on there being a trust. As we agree with the learned trial judge that there was no cogent evidence of trust, the sixth defendant's submission on illegality based on breach of trust is, in our considered view, obviously without merit.

[21] On the consent judgment, the learned trial judge had made the H following findings as shown at pp. 25-26 of her grounds of judgment:

> The 5th defendant had, in accordance with the consent judgment, executed a Memorandum of Transfer and Form 5 on 3.6.1999 (Ex. P34). The 5th defendant had filed a suit nine years later to set aside the Consent Judgment (MT 3-356-2008). There was no explanation for the I inordinate delay and the suit was struck out *in limine*. There was no challenge to the court order. The terms of the Consent Judgment is also not inconsistent with the injunction dated 14.04.1993, whereupon the

application of the plaintiffs, the High Court had granted an injunction to restrain the 1st defendant from selling the said land to anyone except the plaintiffs, pending the final disposal of the action.

I find insufficient evidence to support the 6th defendant's contention that the 5th defendant had been induced to enter the Consent Judgment. Thus the Consent Judgment between the 5th defendant and the plaintiffs is valid and binding.

[22] We bear in mind that the fifth defendant in his "affidavit jawapan" as shown in exh. P25 of the plaintiffs' core bundle at pp. 256 to 296 had affirmed that the first defendant was the beneficial owner of the land, that the AA was valid and that he and the other registered owner no longer had any interest in the said land.

[23] We opine that the finding of the learned trial judge that there was insufficient evidence to support the sixth defendant's contention that the fifth defendant had been induced to enter the consent judgment was a finding of facts. The sixth defendant had not shown any valid reason which justified appellate intervention. Having perused the notes of proceedings, we found no evidence to impugn the consent judgment. First, we took note that it was not the sixth defendant's pleaded case that the plaintiffs had knowledge of the, alleged trust by entering into the contract to purchase or that the plaintiffs were not *bona fide* purchasers for value. Having examined the relevant documents, we found even the JV agreement and AA did not provide that the said land was the subject matter of a trust. The sixth defendant himself, in his evidence before the court as shown in RRT vol. 2 at p. 298, had admitted that he did not know whether the plaintiffs would know about the said land being claimed by the sixth defendant before 1999. There were also evidence of DW4 and DW9 as shown at pp. 463 - 437, RRT vol. 3 and RR vol. 7 p. 1194 respectively, that they were not aware of any controversies surrounding the said land at the time of the JV and did not know that the said land was a trust land. From the notes of proceedings, we also took note that the first plaintiff had been put under gruelling cross-examination by the sixth defendant's counsel and yet he maintained his position that he was not aware of any controversy surrounding the said land as shown in RRT vol. 1 and 2. We therefore, were of the view that the sixth defendant's contention that the consent judgment was entered to undermine the legitimate interest of the contributors, to steal a march and that it was an abuse of process was indeed without merit.

[24] To show that the consent judgment was tainted, learned counsel for the sixth defendant had referred this court to, *inter alia*, affidavits of Tarama Rajah a/l Subramaniam, Karunnamoorthy a/l Kolandai and Muthiah a/l Veeran, respectively. However, we noted that none of them was called to testify at the trial and their names were also not in the list of 17 contributories who were said to have made some payments.

[25] He also referred to the statutory declaration by one Muthiah s/o Re Sundram who was then the Secretary General of MDA. However, nowhere in his statutory declaration did Muthiah aver that the registered proprietors were to be trustees over the said land.

[26] Learned counsel for the sixth defendant had also referred to seven caveats entered into against the land in 1995. However, we were of the view, the point in time where *bona fide* purchaser for value can be infected with notice is at the date the transaction was entered into. In this instant case, the transaction to buy the said land was said to be on 24 September 1991. So the time for this court to consider whether there was knowledge of other interest in the said land was 24 September 1991. See the Federal Court decision in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 at p. 508 which was followed by the Court of Appeal in *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346 at pp. 372 to 373.

[27] In *Malaysia Discounts Bhd & Ors v. Pesaka Astana (M) Sdn Bhd & Ors* [2008] 6 MLJ 839, the court held *inter alia*:

> Held (1) A consent judgment is to be interpreted in the same was as a contract. Thus, the usual principles of contractual construction apply in the instant case: the paramount consideration was to ascertain the intention of the parties to the consent judgment. Such intention was to be assessed objectively by the court, in particular by reviewing the language employed in the consent judgment ...

[28] In *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases* [2006] 8 CLJ 364 the court had *inter alia* held:

> (1) A consent order is binding and acts as an estoppel. A consent order can only be set aside if the consent of any party is obtained by "fraud, intimidation, force, meditated imposition, circumvention surprise, and ..."
>
> The list and reasons to set aside a consent order can never be exhaustive ...

[29] Like in the case of *Phuah Beng Chooi*, *supra*, we did not find in this instant case any evidence of fraud, duress or any threat, inducement or promise to vitiate the consent order. Hence, learned counsel for the sixth defendant's submission on the illegality of the consent order was also in our considered view, wholly unmeritorious.

[30] The next issue raised by learned counsel for the sixth defendant was the excess of jurisdiction by the arbitrator. It was his argument that the arbitrator exceeded his jurisdiction by going out of the four corners of the JV agreement to award an unsolicited remedy of taking over the said land in settlement of the claim in debt. Such a remedy he argued, was not in our jurisprudence or in the armoury of the arbitrator. He contended that the JV agreement only allowed the arbitrator to decide the dispute submitted to the arbitrator by the parties. That the scope of the arbitral submission was

A spelt out in the JV agreement, that was to determine the liability in the event of default or breach, secondly to allow the land to be sold and to refund to the landowner, the excess money. These two were consented to by the parties.

B **[31]** On this issue, we would like to first refer to the Federal Court decision in *Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors* [1997] 2 CLJ 58 in which the Federal Court had *inter alia* held:

> [6] The point of jurisdiction was not raised before the order for sale was made on 3 September 1991, but raised only as an afterthought in a subsequent summon in the same case filed on 8 Jun 1992 ...
>
C
> [7] We do not think that the point on jurisdiction could be so raised and acted upon by the Judge ...

[32] We observed that in this instant case, the sixth defendant had never taken the issue of jurisdiction in the High Court nor was it raised in the D memorandum of appeal before this court. Thus, it is plainly obvious to us that this plea of jurisdiction is an afterthought and following the case of *Scotch Leasing Sdn Bhd*, *supra*, it cannot now be raised.

[33] In any event, learned counsel for the sixth defendant himself had submitted that the arbitrator submission is spelt out in the JV agreement. E Clause 10 of the JV agreement is very clear. It says:

> 10. In the event of the failure of the 1st Party to settle the consideration amount of $250,000.00 and liquidated damages accrued thereon in accordance with Clauses 6, 7, & 8 above, the 2nd Party shall have the right to sell the said land in such manner as it may deem fit for the purpose
>
F
> of the recovery of the amounts due to it and any balance of the Sale price thereafter shall be paid to the 1st Party.

[34] Clause 14 of the JV agreement provides that any dispute arising out of the agreement shall be referred to arbitration. Further, the sixth defendant himself had *vide* para. 6.4 of his submissions admitted that under the AA, the G first defendant was empowered to register the said land in its name if the fifth defendant had not settled the debt owed to it:

> 6.4 … For the present purpose it is important to note that MMCE was only empowered to register the Subject [the said Land] and in their name if the 5th Defendant had not settled the debt owed to them within the
>
H
> specified period of time;

[35] Section 17 of the Arbitration Act 1952 *inter alia* provides that "... the award ... shall be final and binding on the parties and the persons claiming under them respectively ..." .

I **[36]** At all material times, there was no application to set aside the AA. There was also no appeal by any of the parties to the AA against the order for the enforcement of the AA. By virtue of s. 17 of the Arbitration Act, the AA is therefore final and binding.

[37] For the reasons discussed, it was our unanimous decision that on questions of illegality and excess of jurisdiction, with respect, we found no merit on the submission of learned counsel for the sixth defendant.

[38] Now we shall deal with the main issue ie, whether there was a concluded binding sale and purchase agreement between the plaintiffs and the first defendant. On this issue, the learned trial judge had found that there was. We reproduce below the relevant part of her grounds of judgment:

> A meeting was held on the 24.9.1991, between the 1st and 2nd defendant and the representatives of the plaintiffs at which the essential terms such as the purchase price and terms of payment had been agreed to by parties. On the same day the plaintiffs paid a deposit of RM40,000 (10% of purchase price) to the 2nd defendant as solicitors of the 1st defendant. (Exhibits P. 109, P. 110). It was agreed that the balance of RM360,000 was to be paid by the plaintiffs to the 1st defendant upon the signing of a Sale and Purchase Agreement.
>
> By a letter dated 26.09.1991 the 1st defendant issued a letter to the plaintiffs giving them the option to purchase the said land after the same had been registered in the 1st defendant's name and subject to certain terms and conditions. The option to purchase was to be exercised on or before 07.10.1991 (Ex. P4).
>
> The 1st defendant's contention is that on failure of the plaintiffs to exercise the option by the stipulated date, the offer by the 1st defendant to sell the said land had expired. On the contrary, the plaintiffs contend that the option had been extended to 12.12.1991. The SPA was signed by the plaintiffs before the expiry of the extended date and forwarded to the 2nd defendant as solicitors of the 1st defendant.
>
> From the oral and documentary evidence, I find cogent evidence that despite the 1st defendant's letter of 26.9.1991, which set out conditions for purchase and expiry of option on 7.10.1991, correspondences between the solicitors of both parties after the expiry of the option period (ex. P80 and Ex. P62) demonstrate a subsisting intention of parties to proceed with the sale and purchase of the said land.
>
> Correspondences between the solicitors of both parties had also confirmed the essential terms of the agreement. There was a draft Sales and Purchase Agreement (D60). This was supported by the 2nd defendant (the 1st defendant's solicitors) by letter of 29.11.1991 (P80) and accepted by the plaintiffs' solicitors on 02.12.1991 (D62). The plaintiffs had paid a deposit of RM40,000 on 24.9.1991. The 1st defendant did not return the deposit of the purchase price paid by the plaintiffs.
>
> Thus I find there was a concluded valid and binding contract between the plaintiffs and the 1st defendant for the sale and purchase of the said land notwithstanding:
>
> (i) No formal Sale and Purchase Agreement was executed and
>
> (ii) The Sale and Purchase of the said land was conditional on the said land being transferred to the 1st defendant.

In the case of *Air Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754 S.C., Edgar Joseph Jr. had expounded the principles to determine whether a concluded contract had come into existence:

> … the existence of an agreement depends upon the intention of parties, who must be *ad idem*. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstance and the object of the contract. The court will generally apply an objective or reasonable man test.

In the case of *Kho Ah Soon v. Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 MLJ, 293, the Court of Appeal had also found there was a concluded agreement for the sale and purchase of land although the agreement was not formalised by execution. The evidence showed that in meetings and correspondences, the parties had agreed to the salient terms which include the purchase price and when payment of purchase price became payable.

In addition, on 14.04.1993, the High Court had granted the plaintiffs an injunction to restrain the 1st defendant from selling the said land to anyone except the plaintiffs, pending the final disposal of the action.

[39] The position taken by all the defendants is that there was no concluded binding sale and purchase agreement and that the contract entered into between the plaintiffs and the first defendant was a conditional contract which was not enforceable as the said land was not registered in the first defendant's name. For the first defendant, it was further argued that there was no concluded contract as the alleged counter proposal of the purchase price from RM400,000 to RM430,000 was not agreed upon by parties. The first defendant's right on the said land was merely contractual and that had been extinguished when their debt was fully settled by the third defendant on behalf of the registered proprietors.

[40] Let us first look at the purchase price issue. In order to determine what was agreed by the parties, we had examined the documents relied upon in their submissions. The first defendant had taken objection to the plaintiffs referring to ID10 and ID11 to prove that the parties had confirmed the terms of the agreement; as these were not marked as exhibits. He relied on the case of *Abdul Kudus Hj Abd Aziz v. Normah Cik* [2003] 1 LNS 189; [2003] 6 MLJ 169 wherein the High Court at Shah Alam agreed with the appellant's submission that the Magistrate had erred in taking a document marked as "ID" into consideration in making a considered decision in that case. However, learned counsel for the plaintiffs had pointed out that even the first defendant had referred to ID documents ie, ID10 and ID14 to prove that there existed a counter proposal for the first defendant's lawyer for RM430,000. Hence it did not lie in the first defendant's mouth to contest "ID" documents referred to by the plaintiffs and thereafter sought for this court to consider ID documents to support their points.

[41] Learned counsel for the plaintiffs had referred to *IJM Corporation Berhad v. Zamri Hj Ibrahim & Anor* [2014] 7 CLJ 479; [2014] 2 MLJ 335 wherein the Court of Appeal in that case, in setting aside the High Court's

decision, admitted an "ID" document even though the maker of the "ID" document was not called because the conduct of the respondents therein supports the fact that the "ID" document was sent to the respondents. We felt that *IJM* case, *supra*, can be distinguished as in that case, counsel for the appellant had appealed against the High Court's refused to mark an ID document as an exhibit. Hence, it was a live issue before the Court of Appeal there as to whether the High Court was correct in refusing to mark an ID document. Whereas in this instant case, there was no appeal by the respondents against the non-marking of ID14 by the High Court to an exhibit. Hence, we opined neither the plaintiffs nor the defendants had any right to refer to that ID14 or any other ID documents as they were never admitted documents in the High Court.

[42] That being the case, we also felt the plaintiffs' claim should not be denounced just because of the non-admission of the ID documents. We found that it was a fact that was not disputed that the plaintiffs had already paid a deposit amounting to 10% of the purchase price of RM400,000 on 24 September 1991. This was in response to the oral offer made by the first defendant at a meeting between them on the same date, that the first defendant offered to sell the said land to the plaintiffs upon the enforcement of the AA.

[43] Two days later on 26 September 1991, the first defendant sent a letter to the plaintiffs confirming the meeting on 24 September 1991 and setting out the terms and conditions for the sale of the said land. The offer was said to be valid until 7 October 1991. The offer was extended to 12 December 1991 as shown in exh. D45.

[44] Later, a draft SPA (D60) was forwarded to the first defendant's solicitor for approval. On 29 November 1991, the first defendant's solicitor amended the draft and approved the terms for SPA (P80). The approved and amended SPA (ID8) was signed by the plaintiffs and forwarded to first defendant's solicitor on 2 December 1991 (D62) together with a deed of assignment (D78). Thereafter, despite repeated reminders to the first defendant's solicitor, the SPA (ID8) was not returned by the first defendant's solicitor duly signed by the first defendant.

[45] In *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 1 CLJ 233; [1983] CLJ (Rep) 231; [1983] 2 MLJ 39, the appellants refused to complete the sale agreement and the respondent applied for specific performance. The respondent averred there was a concluded contract and the appellants contended that the sale was subject to contract and they had informed the respondent's solicitor that they did not wish to sell the property. The offer and acceptance were made during a telephone conversation on 3 March 1976 and the respondent paid a deposit of 10%. The Federal Court held:

> on the evidence and the exhibits in this case it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written agreement had to be drawn up

A and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. A legally binding and enforceable agreement was concluded on March 3, 1976 and the learned Judge had not erred either in law or fact in arriving at the finding that he did.

[46] In *Kho Ah Soon v. Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 CLJ 812; B [1995] 3 MLJ 293, the Court of Appeal held *inter alia*:

(3) Although the respondent maintained that there was no concluded agreement with the appellant, the respondent had acted contrary to that contention. This was evidenced by its letter confirmation dated 4 March 1994 which referred to a draft agreement to be prepared by the appellant's C solicitors at the request of the respondent. Further, it seemed that the reason why the respondent backed out of the agreement was not that the terms had not been agreed upon, but that there was no consensus as to the date that the agreement should carry.

[47] Following the above, we therefore found that there existed a valid and D binding contract between the plaintiffs and the first defendant for the sale and purchase of the said land on 24 September 1991; when the first defendant made the offer, the plaintiffs accepted and paid the deposit; notwithstanding the fact that the land was not registered in the first defendant's name. The Federal Court in *Halimah Abdul Rahman v. Fatimah Abdullah* [1976] 1 LNS 38; [1976] 2 MLJ 64 held:

E ... S.K. Das in his book on the Torrens System in Malaya. On page 358 the learned author wrote:

… If a vendor having neither a title nor the power to obtain a title contracts to sell land and subsequently before the date fixed for completion he acquires power to call for title the purchaser can F force him to complete. The fact that at the date of the contract the vendor had neither title nor power to call for title is of itself no answer to a suit for specific performance by either party: *Brickles v. Shell* [1916] 2 AC 599.

[48] The Court of Appeal in *Golden Vale Golf Range & Country Club Sdn Bhd* G *v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31; [2008] 4 MLJ 839 CA affirmed the High Court's findings which allowed the defendant's counterclaim for specific performance wherein it was *inter alia* decided that a party cannot rely on its own wrong to defeat its opponent's claim. Gopal Sri Ram JCA held:

H ... Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim. In *Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 at p 304, Wan Hamzah SCJ when delivering the judgment of the Supreme Court said:

I The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or

> to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v. SDAECD France* [1919] AC 1.

[49] The fact that the land must first be registered in the first defendant's name pursuant to the AA is within the power of the first defendant to secure. Hence, to use that as an excuse would be to permit the first defendant to take advantage of his own wrongdoing, which we feel this court must not allow.

[50] As to the argument that the enforcement of the AA was a prerequisite to the contract, I agree with learned counsel for the plaintiffs that this is now academic. As stated earlier in this judgment, this application involves consolidated actions of three suits, one of which is OS No R8-245-70-1990 in which the first defendant sought to enforce the AA. The learned trial judge had allowed the first defendant's prayer. Before us, none of the parties, but the sixth defendant, was appealing against this particular decision. We had decided against the sixth defendant earlier, and as for the rest of the defendants, there being no appeals by any of them to the first defendant's action against that judgment, the consequence is that the appellants cannot now challenge the validity of the AA or that the AA cannot be enforced. As we had said earlier and we reiterate it now, as long as the AA is not set aside, the AA is akin to a final judgment of court. Non-registration of the AA under the Arbitration Act 1952 does not render it invalid at all. Registration is only required only if it is sought to employ the machinery of the court to enforce the same.

[51] In *Tan Kau Tiah v. Tetuan Teh Kim Teh, Salina & Co & Anor* [2010] 4 CLJ 914; [2010] 5 AMR 391, the Court of Appeal had in para. [62], at p. 940 (CLJ); p. 410 to 411 (AMR) stated:

> It was argued on behalf of the first respondent that the appellant was seeking to register the arbitral award under s 27 of the Arbitration Act 1952 (Act 93). However, s 27 of the Arbitration Act 1952 (Act 93) talks of an enforcement of an award and not in regard to registering an arbitral award. That section is worded as follows:
>
> 27. Enforcement
>
> An award on an arbitration agreement may, be leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, where leave is so given, judgment may be entered in terms of the award.

And at para. (63) at p. 940 (CLJ); p. 411 (AMR):

> And it simply means this. That the appellant is seeking to enforce the arbitral award against the losing party named therein. And if the losing party complies with the arbitral award, there would be no necessity to apply for leave to enforce the said award. **Section 27 of the Arbitration Act 1952 (Act 93) does not say that lack of such leave to enforce would**

> **make the arbitral award not valid or non-binding**. Not securing leave to enforce the arbitral award would simply mean that the winning party is not entitled to secure the aid of the court machinery to enforce the arbitral award which is akin to a judgment secured in most proceedings ... The appellant is merely relying on the undertaking given by first respondent upon occurrence of an event. Here, the event would be the handing down of the arbitration award by the arbitrator on May 4, 2007.

On appeal to the Federal Court in *Tetuan Teh Kim Teh, Salina & Co v. Tan Kau Tiah & Anor* [2013] 5 CLJ 161; [2013] 4 MLJ 313 we also note that although the Federal Court had set aside the Court of Appeal's decision, the Federal Court did so purely on the ground that in an interpleader summons, a counterclaim cannot be filed. The Federal Court did not decide or set aside the Court of Appeal's ruling on the finality and validity of an arbitration award under s. 17 of the Arbitration Act 1952. Therefore, this principle remains good law.

Conclusion

[52] The Federal Court in *Conlay Construction Sdn Bhd v. Peremban (M) Sdn Bhd* [2013] 9 CLJ 828; [2014] 1 MLJ 80 had *inter alia* held:

> (1) There was no cause for the COA to have set aside the decision of the High Court in the circumstances of the case. The COA could only do so in a case of this nature if the trial judge was plainly wrong in coming to her decision. The case before the High Court involved findings of facts. Unless the trial judge was plainly wrong, it was not open to the COA to have intervened even to the limited extent of ordering a retrial (see para. 10).
>
> (2) ...
>
> (3) As the trial judge had gone through all evidence both oral and documentary and had given reasons for her findings which the COA was not in a position to controvert, the COA was wrong to have exercised its powers of appellate interference, more so in the present case when the COA was found to be uncertain in its grounds of judgment on whether it had ordered a retrial of the case or not. Clearly, in revising the decision of the High Court the COA had not correctly applied the principle of appellate intervention (see para 15).
>
> (4) ...

[53] We were of the considered view that this case before the High Court was explicitly one that involved findings of facts and it was one where the learned trial judge had gone through all evidence both oral and documentary and had given reasons to such findings which this court, to use the Federal Court's words in *Conlay Construction Sdn Bhd* case, *supra*, "is not in a position to controvert". As in the Court of Appeal decision in *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746, we found there was indeed a valid concluded and binding contract despite there was a non-existence of a duly executed formal agreement. The first defendant had made its offer and the plaintiffs had accepted it. There was

consideration. The deposit paid was kept by the first defendant and was never returned to the plaintiffs which shows the unequivocal act of part performance by the plaintiffs. There were also certainties of parties, price and property. We therefore, are of the considered view that the findings made by the learned trial judge should not be disturbed and this case is one which does not warrant appellate intervention. We also wish to mention that we agree with the learned trial judge's decision and reasons that the third defendant was not a *bona fide* purchaser for value.

[54] In the circumstances, we were unanimous that there were no merits in all these appeals and that these appeals ought and were therefore dismissed with costs of RM40,000 against each appellant in each appeal except for appeal No. B-02-1004-05-2012, the appellants therein are to be jointly and severally liable for the said amount of costs.